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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 524

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,

Petitioner,

against

SS. *NASSAU,* her engines, etc., and

against

INCRES STEAMSHIP COMPANY, LTD.,

Respondent.

BRIEF OF RESPONDENT, SS. *NASSAU,* HER ENGINES, ETC. AND INCRES STEAMSHIP COMPANY, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 991.

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,

Petitioner,

against

SS *Nassau,* her engines, etc., and

against

INCRES STEAMSHIP COMPANY, LTD.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of United States District Judge Dudley Bonsal, denying libelant's motion to strike respondent's statute of limitations defense and granting respondent's motion to dismiss the libel, is officially reported at 223 F. Supp. 374. It is printed in Appellant's Appendix in the court below.

The opinion of the Court of Appeals for the Second Circuit is reported in 345 F. 2d 465 and is printed in Petitioner's Appendix beginning at page 10.

Jurisdiction.

It is not disputed that the jurisdiction of this court is invoked by virtue of 28 U. S. Code 1254. (1).

Question Presented.

Whether respondent's time-for-suit clause in the ticket-contract, which barred the petitioner's suit as not timely filed within one year from the date when petitioner was appointed executrix of a deceased passenger, was valid under Section 4283A(c) of the Revised Statutes (46 U. S. Code 183b).

Statement of Case.

The deceased, husband of petitioner and a passenger aboard respondent's vessel, suffered a heart attack aboard the SS *Nassau,* enroute between New York and Bermuda, on May 7, 1960. The vessel arranged to fly him by helicopter to the United States mainland where he was hospitalized. He died on May 8, 1960. Petitioner was appointed executrix on May 20, 1960.

She filed a libel against respondent in the United States District Court for the Southern District of New York on May 3, 1962, i.e., seventeen days less than two years from her appointment and five days less than two years from her husband's death.

The ticket contract under which petitioner and her husband sailed reads in pertinent part under Article 13:

> "Suit to recover on any claim shall not be maintainable unless commenced and process served as follows:
>
> (1) Within one (1) year from the date when the death or injury occurred in respect of any claim for

loss of life or bodily injury in any case where said Section 4283A [of the Revised Statutes] shall apply . . ."

Article 15 of the contract states that:

"The terms of this passage contract shall be separable and the illegality of any article, paragraph, clause, or provision of this passage contract, in whole or in part, shall not affect or invalidate any other article, paragraph, clause or provision thereof."

Section 4283A of the Revised Statutes (46 U. S. Code 183b) reads:

"SEC. 4283A. Stipulations limiting time for filing claims and commencing suit.—(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred."

"(c) . . . [I]f the action is one for wrongful death, any 'awful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such . . . decedent's estate, but shall be applicable from the date of the appointment of such legal representative . . ."

Federal District Judge Bonsal held (223 F. Supp. 374) that the ticket contract provision was valid and barred

the suit because the libel was not filed within one year from petitioner's appointment. Since the filing of the libel after the one year period was the earliest time when the suit could be regarded as having been instituted, it is and was impossible for any genuine issue to have been presented concerning the question of later service of process. The Second Circuit Court of Appeals (345 F. 2d 465) affirmed. The judgment of the United States Court of Appeals was entered on May 7, 1965.

Following that, libelant-appellant sought re-hearing which the Second Circuit Court of Appeals denied on June 7, 1965.

Reasons for Denying Writ.

1.

The writ is sought by the petitioner because, she says, this ticket clause has been divergently ruled upon. But this argument is more apparent than real.

Clearly there is no conflict at all between any Circuits and in fact the only other federal district court that has been reported as ruling upon this matter is the District Court of Massachusetts in the case of *Abbasciano* v. *Home Lines Agency, Inc.*, 144 F. Supp. 235 (1956), which is in exact harmony with the Second Circuit. That case flatly held an identical ticket clause valid.

Judge Bonsal in making his district court determination in the case at bar, notwithstanding *Barrette* v. *Home Lines, Inc.*, 168 F. Supp. 141, had every right to disagree with the reasoning expressed therein by Judge Kaufman in his former function as a federal district judge, and to hold the instant ticket clause valid. Now the Second Circuit in the instant case has affirmed its validity. The only other known decision on this point is the decision of a non-appellate state

court, Supreme Court, Kings County, viz., *Glusman* v. *United States Lines Co.*, 241 N. Y. Supp. 2d 960, 39 Misc. 2d 845, which is completely based on the now-overruled *Barrette* decision that was rejected by the Court of Appeals.

2.

The decision below was correct. Petitioner again alleges the "abstract illegality" of the clause by conjuring another hypothetical illustration wherein another tardy litigant might abandon his case in the belief that although he was able to start his suit by filing his initial pleading in federal court within one year, he would be unable to serve process within that period. In his dissent, Judge Kaufman urged that the question again be determined in the "abstract". While agreeing with the majority that the service of process provision in the contract is mere unenforceable surplusage in a federal court action such as petitioner's, Judge Kaufman nevertheless rejects the concept that such a clause may have valid significance in the context of various state court procedures. Manifestly, it is not the function of certiorari to obtain review of hypothetical or "abstract" controversies.

The Second Circuit termed this an "abstract 'illegality'" and refused to credit that hypothetical possibility with any concrete or reversal-warranting effect.

Mrs. Schwartz' husband died May 8, 1960.

Mrs. Schwartz was appointed executrix May 20, 1960.

Suit was commenced (filed) May 3, 1962.

It strains plausibility to say the petitioner can call upon a court to tailor her facts to fit the hypothetical situation under which another hypothetical litigant might conceivably be prejudiced. This Honorable Court was presented with such abstract hypothetical possibilities that might someday evolve from its landmark decision on the question

of whether a case was or was not within the maritime jurisdiction. It wrote:

> "* * * Various far-fetched hypotheticals are raised * * *. We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction * * *". *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 at 210.

Moreover, the instant petition has glossed over the effect of Article 15 of this ticket-contract under which article the Court of Appeals below held that the reference to service of process in Article 13 is severable. The Court correctly stated that it was libelant's failure to comply with the other clearly legal contract provisions, notwithstanding the severable, supposedly illegal, provision, upon which the defense of limitations was based.

In 1941, the Second Circuit Court of Appeals affirmed the dismissal of a passenger's personal injury action brought twenty-five (25) months after the event. The dismissal was based on a ticket provision limiting suits to one year.

Plaintiff asserted that, "* * * this provision is inextricably tied to, and made dependent upon, a provision for notice of claim within 40 days after termination of the voyage". *Foster* v. *Cunard White Star Ltd.*, 121 F. 2d 12, 13 (2 Cir. 1941).

Clearly the notice of claim provision in that case was invalid because contrary to the same statutes involved in the case at bar. The plaintiff in that *Foster* case argued in virtually the same words used in the *Barrette* case; virtually the same words used by the dissent and by the petitioner in the case at bar in the lower courts.

The Second Circuit, referring to the language of that argument, wrote (121 F. 2d at page 13) that, "* * * the illegality of one was not intended to, and should not, invalidate the other. (Citing cases.)" The cited cases supported, and still support, the sound doctrine of severability which the Second Circuit has herein applied.

The decisions of the District Court and of the Second Circuit in this *Schwartz* case were correct and review is not warranted.

Conclusion.

The instant petition should be denied.

Respectfully submitted,

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Ralph C. Kreimer,
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Of Counsel.

END